Supreme Court, U.S.
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No. 97-12

In The

Supreme Court of the United States

October Term, 1996

EDDIE LEE ROWE, SR.,

Petitioner,

vs.

WALGREEN COMPANY AND TONY FRIZZELL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals properly reviewed the competent evidence submitted by the parties when it affirmed the summary judgment granted by the District Court in favor of Respondents Walgreen Co. and Tony Frizzell on Petitioner Eddie Rowe's claims of race discrimination and intentional infliction of emotional distress?

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BRIEF IN OPPOSITION

Respondents file this Brief in Opposition and respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History. This is an appeal from a summary judgment granted in favor of Respondents Walgreen Co. ("Walgreens") and Tony Frizzell ("Frizzell") (collectively "Respondents"). Petitioner Eddie Lee Rowe, Sr. ("Rowe") filed a state court lawsuit against Respondents alleging discrimination because of his race and age in violation of TEX. LAB. CODE ANN. § 21.051; 42 U.S.C. § 1981 and §§ 2000e *et seq.*; and 29 U.S.C. §§ 621 *et seq.* Rowe also alleged a state law claim of intentional infliction of emotional distress. Respondents timely removed the case to federal court based on federal question jurisdiction, and moved for summary judgment. The District Court granted Respondents' motion, holding that Rowe had failed to raise genuine issues of material fact regarding his *prima facie* cases of age and race discrimination, pretext and the outrageous conduct necessary to support his claim of intentional infliction of emotional distress. Additionally, the District Court denied Rowe's claim for individual liability against Frizzell for discrimination (Pet., App. C). Rowe appealed the judgment of the District Court to the Fifth Circuit, which affirmed in an unpublished opinion, incorporating the opinion of the

District Court into its own (Pet., App. A).[1] Rowe's petition for rehearing by the Fifth Circuit was denied without further comment (Pet., App. B).

Statement of Facts. Rowe began working for Walgreens as an Assistant Manager in 1978 (R.V. 3, 381). In 1981, Rowe was promoted to the position of store manager (R.V. 3, 392). Between 1981 and late-1993, Rowe was demoted from store manager two (2) times, and promoted back to store manager after additional training; Rowe never complained about these demotions (R.V. 3, 262-265, 267-274, 282). During his stints as store manager, Rowe was given performance reviews by several different Walgreens District Managers (R.V. 3, 267-274, 355-359). It is undisputed that throughout his entire career, Rowe never received an overall performance rating higher than "standard"; indeed, many of his performance ratings were barely within the "standard" range (R.V. 3, 267-274, 355-359). Again, Rowe never complained about these ratings (R.V. 3, 363-367).

In early-October 1993, Rowe was counselled by his District Manager, Donald Witt, and the Regional Vice-President, Richard McMillin, about numerous problems with his job performance, including his store's condition and improper control of merchandise (R.V. 3, 212-213, 267-274, 327-332). Witt and McMillin gave Rowe two (2)

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[1] Rowe did not appeal the District Court's summary judgment on his claim of age discrimination, and has not included that claim in his petition for writ of certiorari. Moreover, Rowe's petition for writ of certiorari does not seek review of the ruling that Frizzell is not individually liable for the alleged discrimination.

weeks to improve in these areas; otherwise, he would be terminated or demoted (R.V. 3, 212-213, 267-274, 330-331). However, before this two-week period ended, Witt was replaced as District Manager by Frizzell, formerly a District Manager for Walgreens in Miami, Florida (R.V. 3, 262-265, 267-274). Upon Frizzell's arrival, Rowe's two-week probationary period was "dropped" by Frizzell and McMillin, so that Rowe would have an opportunity to improve under Frizzell's supervision (R.V. 3, 262-265, 267-274).

After Frizzell arrived, he reviewed Rowe's performance and his store's operations several times (R.V. 3, 219-226, 262-265). In each review, Frizzell noted serious problems with the condition of Rowe's store, inventory management, and his performance managing employees (R.V. 3, 219-226, 349). Because of Rowe's lack of sustained improvement in the noted problem areas, he received a rating of "below standard" from Frizzell in February 1994 (R.V. 3, 219-226, 262-265). Frizzell reevaluated Rowe and his store three weeks later, and determined that Rowe had failed to improve his performance (R.V. 3, 217, 262-265). At this time, Rowe was given thirty (30) days to improve his performance to the level expected of Walgreens store managers, or face removal from the position of store manager (R.V. 3, 262-265, 267-274, 322-323).

During the 30-day probationary period, Rowe did not make the required improvements in his performance or in the condition of his store; indeed, additional problems became apparent during the 30-day period, including failure to adhere to Walgreens' audit control policies, failure to direct his subordinates to remove outdated merchandise and realign items on the store shelves, and

failure to direct his subordinates to perform basic daily tasks, such as maintaining the store in good condition and properly maintaining stockroom inventory (R.V. 3, 264, 267-274). Because of his failure to cure his performance deficiencies, Rowe was demoted to assistant manager and reassigned for additional training on June 6, 1994 (R.V. 3, 262-265, 267-274). The purpose of the additional training was to assist Rowe in returning to a position as store manager; both Frizzell and McMillin believed that Rowe could be re-promoted after completing additional training (R.V. 3, 267-274).

Although demoted store managers ordinarily were not permitted to select their new store assignments, Rowe was allowed to choose the Houston-area Walgreens location in which to work as an assistant manager (R.V. 3, 267-274, 316-317, 347-348). Rowe chose to work at a store in Sugar Land, Texas, only ten (10) minutes from his home (R.V. 3, 316-317). When he chose this location, he knew the store was open 24 hours each day (R.V. 3, 316-317). Prior to taking his new assignment, Rowe took a combined three (3) months of vacation, and a subsequent leave of absence (R.V. 3, 267-274, 319). Although demoted, Rowe's salary was higher than that for the executive assistants, and higher than that received by other assistant managers in Frizzell's district (R.V. 3, 267-274).

On November 5, 1994, Rowe voluntarily resigned his position as assistant manager after working only a few weeks in that position (R.V. 3, 267-274, 383). At the time of his resignation, Rowe's District Manager was Dennis Schmitt, not Frizzell (R.V. 3, 314-315). Although Rowe claims he resigned because he would not be a store

manager again, he told Bob Petty, his store manager, that he was resigning because of personal and financial problems, and that he did not want to work on Sundays (R.V. 3, 205-208, 210, 313). In his conversation with Petty, Rowe did not mention race or age discrimination, or his demotion (R.V. 3, 205-208, 210).

In May 1994, Rowe's mother moved to Houston. In connection with his mother's move, Rowe asked Frizzell if he could have the Monday after Mother's Day off (R.V. 3, 288). Rowe did not tell Frizzell that the reason he wanted the day off was to take his mother to the doctor (R.V. 3, 283). Believing that he and McMillin might appear at Rowe's store on that same day, Frizzell refused Rowe's request (R.V. 2, 750). Tragically, Rowe's mother suffered a stroke on that day, and she later died from complications from the stroke (R.V. 3, 289). Frizzell allowed Rowe time off to handle the affairs in connection with his mother's illness and funeral (R.V. 3, 284-285).

Correction of Misstatements in the Petition. In his petition for writ of certiorari, Rowe makes several misstatements of fact, mischaracterizes several facts, and omits several important facts, all of which should be brought to the Court's attention. Some of the misstatements, mischaracterizations, and omissions are the following:[2]

1. Rowe states that "he was reassignment [sic] for training" in September 1982, after being

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[2] This list is not complete; several of the omissions and misstatements of fact by Rowe go directly to the grounds he has alleged for review of this case, and have been addressed in the appropriate sections, *infra*, in Respondents' statements of the reasons for denying the writ of certiorari.

a store manager since November 1981 (Pet., p. 1). This action by Walgreens was a *demotion*, not a "reassignment."

2. Rowe fails to state that he was again *demoted* in July 1986, instead claiming that he held the position of "executive assistant" merely because "another store was being readied for him" (Pet., p. 2).

3. Rowe's store was *not* rated "above standard" in August 1993 (Pet., p. 2). The "above standard" rating was on an audit review for cash handling procedures *only*. The evidence is undisputed that Rowe *never* received an overall rating higher than "standard."

4. Rowe downplays the seriousness of the store conditions noted by Witt and McMillin in October 1993 by stating "[w]hile they were very complementary [sic], they found certain items that needed attention" (Pet., p. 2). The evidence shows that the problems were serious enough that Rowe was given two (2) weeks to correct them, or face demotion or termination.

5. Rowe falsely asserts that he "remedied each specific problem and nothing else was ever said about it" (Pet., p. 2). Rowe submitted *no evidence* in support of this self-serving statement. Moreover, the competent evidence submitted by Respondents is replete with references to continuing problems in Rowe's store after October 1993 until his demotion in June 1994, including wholly unchallenged testimony by Rowe's

replacement about the horrendous condition of Rowe's store when she replaced him.

6. Rowe admitted in his deposition that he *did not* tell Frizzell he needed the Monday after Mother's Day off to "take his sick mother to the doctor" (*See* Pet., p. 4).

7. McMillin never testified that "generally the first time a manager receives a 'below standard' rating in their evaluation, the manager is transferred to a lower volume store" (Pet., p. 4). When specifically asked that question, McMillin answered "I don't recall" (R.V. 2, 705-04).

8. The Court may properly ignore evidence relating to "Doug Berry" (Pet., p. 5). Rowe failed to submit any evidence about Mr. Berry to the District Court. Therefore, the Court of Appeals was entitled to ignore this evidence on appeal. *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1327 (5th Cir. 1996).

9. Neither the District Court nor the Court of Appeals held that Rowe had proved a *prima facie* case of discrimination (Pet., p. 6). The District Court expressly stated that "[b]ecause he had received negative evaluations three times between October 1993 and March 1994, however, [Rowe] was not qualified for the position of store manager" (Pet., App. C, p. 8a). The Court of Appeals' only statement about Rowe's *prima facie* case is "[t]o the extent that Rowe makes a prima facie case . . . it is soundly rebutted." (Pet., App. A, p. 2a). The Court of Appeals

then adopts by reference the opinion of the District Court (*Id.*, p. 3a).

10. Rowe asserts that "Walgreen presented irrelevant evidence of white employees who were not under Frizzell's supervision" (Pet., p. 8). Rowe failed to object to the evidence to which he refers; therefore, he has waived any relevancy objection.

11. Rowe asserts he "presented evidence" about "additional parking space" requested by him, and refused by Frizzell (Pet., p. 8). Rowe fails to state that he attempted to present this evidence to the Court of Appeals, but not to the District Court. Respondents objected to consideration of this evidence by the Court of Appeals. *See Guillory, supra.*

12. Rowe asserts that his store "was in the top 25% in profit performance for his district." (Pet., p. 2). This assertion is not supported by the evidence. The evidence cited by Rowe is testimony that his store was in the top quarter, "more or less," in "total sales" in the district (R.V. 2, 690). "Total sales" does not equate to "profits." Rowe presented no evidence about the profit performance of his store during the time period he was being counseled for his performance problems. To the contrary, Walgreens presented undisputed evidence that the profits of Rowe's store were *decreasing* as a result of the issues about which he was being counseled (R.V. 3, 219-26, 350-51).

REASONS FOR DENYING THE WRIT

After failing to "pull the wool over the eyes" of the District Court and the Court of Appeals, Rowe now attempts to essentially convince this Court to *review the evidence* in this case, and reverse the summary judgment granted against him. However, Rowe fails to present a colorable basis for review, relying on a statement of "Questions Presented" with no relation whatsoever to the evidence submitted or rulings in the case, false or misleading references to the evidence in the record, omission of highly probative evidence in support of the judgment, and allegations and arguments wholly unsupported by any competent evidence.

In support of his petition, Rowe presents for consideration by this Court four (4) questions relating to the proper standards of evidentiary review on motions for summary judgment. However, closer examination of the record and opinions in the lower courts shows that Rowe's four questions are overblown and unnecessary. Specifically, the Fifth Circuit's comment that Rowe's argument "defies logic," (*see* Pet., App. A, p. 2a) clearly is just that, a comment; it is neither a "presumption" nor a "holding" as Rowe states in his first question. The Court may properly ignore this question because it is unwarranted by the record.

Rowe's remaining three questions relating to the consideration of evidence, the evaluation of evidence, and the inferences to be drawn from such evidence, are merely redundant subsets of the only real question presented for this Court's consideration. That question, as framed by Respondents, is "Whether the District Court

and Court of Appeals properly reviewed the summary judgment evidence presented by the parties?"

Thus, Rowe presents no novel question of law to be answered by this Court, and he does not argue that existing law is incorrect or should be modified. Instead, Rowe merely asks this Court to again evaluate the evidence, a task already properly completed by the lower courts and reverse their judgment.

A proper evaluation of the law and the evidence reveals that the Fifth Circuit's judgment was correct. Rowe's petition for writ of certiorari should be denied.

ARGUMENT

I. The Court of Appeals and the District Court used the Proper Summary Judgment Standard When They Evaluated the Summary Judgment Evidence Presented by the Parties.

The answer to the question presented, as framed by the Respondents, depends on a review of the summaries of the evidence presented by the parties. The summary of the evidence presented by Rowe in his petition is erroneous in several respects, and will be addressed in more detail later in this brief. First, however, it is necessary to show that the District Court and the Fifth Circuit used the proper legal standards for evaluating the evidence.

A. The Proper Summary Judgment Standard

A proper review of Rowe's petition first requires an accurate statement of the standards for granting summary judgment, as dictated by this Court. Through misleading citation of selected opinions by this Court, Rowe has attempted to "cloud the waters" so emphatically made clear by the Court in its seminal case discussing summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The teaching of *Anderson* that Rowe most blatantly ignores in his petition is that he must show more than *some* factual dispute in order to defeat summary judgment; instead, he must show that the alleged factual dispute is not only "material," but also "genuine." *Id.*, at 248-49. A factual dispute is "material" when it "might affect the outcome of the suit under the governing law." *Id.* at 248. A factual dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the evidence presented by the nonmoving party is merely "colorable," or is not sufficiently probative, summary judgment may be granted. *Id.*, at 249-50. Moreover, the nonmoving party must present evidence, not merely allegations, arguments, and denials. *Id.* at 248-49. In short, the question on summary judgment is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*" *Id.* at 250 (emphasis added).

Rowe also fails to state in his petition additional standards for the review of summary judgment evidence when a court is asked to determine whether a genuine

issue of material fact exists. Specifically, Rowe fails to recognize that presenting general allegations and arguments in response to specific facts is insufficient to raise a genuine issue of material fact. *Lujan v. Nat. Wildlife Federation*, 497 U.S. 871, 888 (1990). Further, the evidence presented in the nonmovants' response must be in admissible form, and cannot consist of mere speculation, hearsay, conclusions, or subjective beliefs. *See, e.g., Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992); *Lechuga v. Southern Pacific Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992). Moreover, the inferences to be drawn from the evidence presented must be rational, reasonable and justifiable; inferences which are "idle, speculative, or conjectural" will not defeat a properly supported summary judgment motion. *Unida v. Levi Strauss & Co.*, 986 F.2d 970 (5th Cir. 1993). Finally, the determination of whether summary judgment is proper can be made only after a review of *all* evidence properly submitted; no proper evidence is to be ignored, and allegations unsupported by proper evidence should not be considered. *Armstrong v. City of Dallas*, 997 F.2d 62, 66 (5th Cir. 1993).

Not surprisingly, it is Rowe's failure to recognize these additional standards for review of summary judgment evidence which render his petition groundless. More specifically, as detailed below, Rowe failed to submit competent evidence specifically contradicting Walgreens' evidence about his severe performance problems. In addition, the inferences he asks this Court to draw are unreasonable and not supported by the competent evidence. After a thorough *de novo* review of the evidence presented by the parties to the District Court, the Fifth Circuit properly held that Rowe had failed to present

issues of fact that were both "material" and "genuine." *See* Opinion of Fifth Circuit, Pet., App. A, p. 2a. The cited language in the Fifth Circuit's opinion reveals that it considered some factual disputes "material" but not "genuine," and some disputes "genuine" but not "material." In this situation, the Fifth Circuit's affirmance of the District Court judgment was proper. *Anderson, supra,* at 248-49.

B. The District Court and the Fifth Circuit Reviewed the Evidence Using the Proper Substantive Law.

Another teaching of *Anderson* is that the determination of materiality is made by reviewing the substantive law to determine which facts are essential to the issues in dispute. *Anderson,* at 248. In this case, the District Court relied on the proper substantive law in identifying which facts were material to the issues before it. Specifically, the District Court enunciated the proper *prima facie* case for Rowe's claims of discrimination and intentional infliction of emotional distress. *See* Opinion of the District Court, Pet., App. C, pp. 7a-8a, 10a. It is also apparent that the District Court understood the proper standard for pretext in discrimination cases. *Id.*, pp. 8a-9a. Moreover, it is clear from the Fifth Circuit's opinion that it also reviewed the evidence using the proper substantive law. *See* Pet., App. A.

II. The District Court and the Court of Appeals Properly Reviewed and Analyzed the Competent Summary Judgment Evidence Presented by the Parties.

As demonstrated above, the District Court and the Fifth Circuit evaluated the summary judgment evidence presented by the parties using the proper legal standards. An accurate review of the summary judgment evidence presented to the lower courts shows that the summary judgment in favor of Respondents was proper, and, therefore, Rowe's petition should be denied.

A. Rowe Failed to Prove a *Prima Facie* Case of Discrimination, and His Evidence of Pretext Failed to Raise a Genuine Issue of Material Fact.

Walgreens moved for summary judgment on the basis that Rowe could not prove his *prima facie* case of race or age discrimination because the evidence showed he was not qualified to remain as a Walgreens store manager when he was demoted to assistant manager. In support of this claim, Walgreens presented evidence which identified the criteria used for evaluating the performance of store managers, and extensive evidence showing that Rowe had failed miserably to maintain the performance level expected of store managers for a period of nearly nine (9) months prior to his demotion (R.V. 3, 212-213, 219-226, 262-265, 267-274, 330-331, 355-359).

More specifically, the evidence presented by Walgreens showed that beginning at least as early as October 1993, Rowe had significant problems in his store with

cleanliness, inventory management, personnel management, and sales and profit performance (R.V. 3, 267-274, 330-333). The evidence presented by Walgreens shows that these problems continued to exist, in varying levels, during subsequent visits by management in November and December 1993, and February, March, and April 1994 (R.V. 3, 219-226, 267-274, 327-333, 349). Walgreens also submitted the testimony of Pamela Kelly, the Walgreens manager who replaced Rowe when he was demoted; Ms. Kelly's properly submitted and unchallenged affidavit details the significant problems which existed at Rowe's store when she arrived (R.V. 3, 240-242).

Rowe's attempts to respond to the overwhelming evidence of his poor performance, and consequently to raise a fact issue about "pretext" were, in the words of the Fifth Circuit, "feckless." Rowe does not dispute that several problems existed in October 1993; instead he merely attempts, without competent evidentiary support, to downplay their seriousness.[3] Even more telling, however, is that *nowhere does Rowe deny that the continuing problems described in detail in Walgreens' evidence actually existed!* Instead, Rowe cynically attempts to minimize their importance by engaging in a game of "Mathematician," pointing out that only a limited number of statements on the supervision reports addressed the problems

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[3] Walgreens objected to Rowe's self-serving, unsupported, and speculative "evidence" that he "remedied each specific problem [identified during the October visit] and nothing else was ever said about it." (Pet., p. 2). Indeed, the allegation that "nothing else was said" ignores the evidence of the problems identified on the other supervision visits about which Walgreens submitted competent evidence.

of cleanliness and "outs."[4] This superficial analysis fails to address the real issue, amply supported by Walgreens evidence, that store cleanliness and inventory problems remained a significant problem for Rowe until his demotion in June 1994. Moreover, Rowe completely failed to address the evidence detailing his problems with managing his employees, and with internal controls.[5] Finally, Rowe submitted *no evidence* disputing any of the statements by Pamela Kelly detailing the condition of Rowe's former store when she took over its management.

Rowe also attempts to prove he was qualified to be a Walgreens store manager by continually relying on the fact that he had maintained a "standard" rating for many years before Frizzell became his District Manager. Rowe relies on *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181-82 (5th Cir. 1996), as support for his assertion that the fact of prior positive evaluations is evidence that subsequent negative evaluations may be pretextual. Rowe's reliance on *Time Warner* is misplaced. *Time Warner* involved a failure to promote, and the court relied on evidence that, *both before and after* the promotion the

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[4] Rowe's assertion that Frizzell "admitted . . . that the supervision notes . . . did not bear out the claim that there were too many 'outs' " is predicated solely on this mathematical analysis. Frizzell stated merely that "that percentage" does not support the claim (R.V. 2, 621-24). However, Frizzell *never* admitted that the outs were not a problem, and Rowe *never* denied they were a problem.

[5] In responding to the evidence about problems with cash controls, Rowe refers to an audit completed in August 1993 which rated his store "above standard." However, he submits no evidence to dispute Walgreens evidence that audit control problems existed in 1994.

plaintiff claimed he was discriminatorily denied, the plaintiff received positive evaluations on the performance element the company relied on to deny the promotion. *Id.*, at 181-82. In contrast, Rowe exhibited performance problems for nearly nine (9) months prior to his demotion, and no evidence exists that his performance was acceptable after his demotion.

Rowe also attempts to prove he was qualified by relying on his own self-evaluation as proof that his performance was "standard." Rowe's subjective belief about his qualifications, and the performance rating he believes he was entitled to, is insufficient to raise a genuine issue of material fact. *See EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1448 (5th Cir. 1995); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992); *Little v. Republic Ref. Co.*, 924 F.2d 93, 96 (5th Cir. 1991).

In sum, there is a substantial amount of undisputed evidence about Rowe's performance problems, and Rowe failed to aver specific facts which contradicted the specific facts presented in proper form by Walgreens. *Lujan v. Nat. Wildlife Federation*, 497 U.S. 871, 888 (1990).

B. Rowe's Arguments About Alleged Different Treatment of White Employees is not Supported by the Summary Judgment Evidence.

Rowe also asserts that he raised a genuine issue of material fact about race discrimination because he proved that white managers were treated better than he was. This argument is not supported by the competent summary judgment evidence submitted by the parties.

Rowe presented evidence that Walgreens store managers Goodson and Hogan were transferred to smaller stores instead of being demoted after they received "below standard" performance ratings;[6] this is true. However, by way of explanation, Walgreens submitted competent evidence that, after receiving these evaluations, Goodson and Hogan each *improved their performance* to the minimum level expected of store managers, and that it was because of this improvement that they were transferred instead of demoted (R.V. 3, 193-195, 267-274).[7] Walgreens also submitted evidence that Rowe was demoted because he *did not* improve his performance to the minimum level after receiving his "below standard" evaluation (R.V. 3, 262-265, 267-274). Moreover, Walgreens submitted extensive evidence identifying several white managers who were demoted after having received overall performance evaluations *higher* than Rowe (R.V. 3, 193-195, 267-274). All of this evidence was completely undisputed by Rowe.[8] The competent summary judgment

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[6] Rowe also identifies Doug Berry as a white manager who was treated more favorably, and alleges a white manager received additional parking space at the store previously managed by Rowe. However, Walgreens objected to these arguments in the Fifth Circuit because Rowe failed to raise them in the District Court. *Guillory, supra,* at 1327.

[7] Walgreens also presented evidence that Goodson's performance subsequently deteriorated again, and that he was terminated as a result (*Id.*).

[8] Rowe now refers to the evidence about the demoted white managers as "irrelevant" (Pet., p. 8). Rowe failed to object to this evidence in the District Court, and has never before claimed the evidence is irrelevant. His objection is untimely.

evidence does not support the claim that white managers were treated better than Rowe.

C. Rowe Failed to Raise a Genuine Issue of Material Fact on His Claim of Intentional Infliction of Emotional Distress.

In his petition, Rowe properly states the legal standard in Texas for maintaining a claim of intentional infliction of emotional distress. *See* Pet., p. 9. Whether a plaintiff has alleged conduct sufficiently "extreme and outrageous" to support a claim of intentional infliction of emotional distress is, in the first instance, a question of law for the court. *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). In support of Rowe's argument about this claim, Rowe asserts that the Fifth Circuit erred in failing to consider his emphatic statement that he informed Frizzell that he needed a day off to take his mother to the doctor. Again, Rowe only tells half the story.

In his deposition, Rowe was asked if he had told Frizzell "that it was an emergency and that [he] had to go to the doctor that day?" Rowe responded, "No." (R.V. 2, 755). Later, Rowe was asked, "Did you tell him, no, I can't work on Monday because my mother is sick and she's in town and she's got to go to the doctor? Did you tell him specifically that it was impossible for you to be at work on Monday because of her doctor's appointment?" Again, Rowe responded, "No." (R.V. 2, 750). It was only after Walgreens had presented its properly supported summary judgment motion that Rowe asserted in an affidavit that he did tell Frizzell that he needed to take his mother to the doctor. In addition, Rowe attempted to

argue, for the first time on appeal, that the second question noted above was compound, and, therefore, objectionable. The Fifth Circuit was entitled to ignore Rowe's untimely objection to the form of the question. *See Daigle v. Maine Medical Center, Inc.*, 14 F.3d 684, 692 n.11 (1st Cir. 1994); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986); *Kirschner v. Broadhead*, 671 F.2d 1034, 1037-38 (7th Cir. 1982); FED. R. CIV. P. 32(d)(3)(B). In addition, the Fifth Circuit was entitled to ignore Rowe's attempt to contradict in his subsequent affidavit, without explanation, his prior sworn deposition testimony. *S.W.S. Erectors v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996). The Fifth Circuit properly affirmed the District Court's ruling that Rowe failed to raise a genuine issue of material fact on his claim of intentional infliction of emotional distress.

III. Conclusion and Prayer

Rowe's petition is replete with allegations that the Fifth Circuit improperly regarded Walgreens' evidence as "true," presumed that Walgreens would not discriminate, drew inferences in favor of Walgreens, and ignored Rowe's evidence. A proper review of the entirety of the evidence reveals that Rowe is sorely mistaken.

Rowe apparently believes that all of his statements, arguments and inferences, regardless of whether they are properly supported by evidence, must be regarded as true, and that no "facts or inferences" may be credited in favor of Walgreens. This argument ignores the fact that objections to evidence may be made and sustained, thus resulting in a proper "disregard" of certain evidence, arguments, and inferences. Indeed, Walgreens objected to several portions of

Rowe's arguments and evidence as unsupported, speculative, misleading, self-serving, and contradictory, among others. Rowe's argument also ignores that fact that much of Walgreens' evidence about Rowe's performance problems remained *completely undisputed* by Rowe, and that inferences may properly be drawn, *in favor of Walgreens*, from that undisputed evidence.

After reviewing the totality of the competent evidence presented by the parties, as required by existing authority, the Fifth Circuit properly concluded that Rowe's evidence, and the reasonable and justifiable inferences therefrom, did not raise genuine issues of material fact about the reasons for Rowe's demotion. Moreover, the Fifth Circuit did not give Walgreens the benefit of disputed facts, presume its truthfulness, or improperly allow inferences in Walgreens favor based on the identity of the parties. Rather, the Fifth Circuit properly based its judgment on competent, and largely uncontroverted, evidence regarding Rowe's sustained performance problems.

Because the evidence fails to raise a genuine issue of material fact, Rowe's petition for writ of certiorari should be denied.

Respectfully submitted,

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